

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

ROBERT H. BRAVER, an individual)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-04-1013-W
)	
AMERIQUEST MORTGAGE,)	
COMPANY INC., et al.)	
)	
Defendants.)	

**DEFENDANT LEAD2NET.NET, INC.’S REPLY BRIEF SUPPORTING ITS
MOTION TO DISMISS**

After being given leave to conduct jurisdictional discovery, the plaintiff filed “Plaintiff’s Response to Motion to Dismiss and Brief in Support of Lead2Net.Net, Inc.” (“Braver’s Response”) (Doc. No. 362). Braver’s Response is anything but a response to several of the basic jurisdictional defects identified in Lead2’s Motion to Dismiss (Doc. No. 336) or to the authorities cited in support thereof. Instead, Braver attempts to create his own standards for the determination of personal jurisdiction, both general and specific, and he seeks to support his “standards” with conclusory allegations which are at odds with (i) the uncontroverted evidence submitted by Lead2, and (ii) plaintiff’s own prior representations to the Court. Braver’s opposition to Lead2’s Motion is based largely upon mere speculation or “questions” and nothing more. Plaintiff’s discovery has uncovered nothing which undermines Lead2’s Motion to Dismiss which should be granted.

I. The Undisputed Jurisdictional Facts Support Dismissal.

Upon the submission by a defendant of affidavits or other evidence which establish facts pertinent to a determination regarding the jurisdiction of the Court, or lack thereof, over a particular defendant, the plaintiff has the burden of submitting evidence in response which

supports the finding that jurisdiction is proper. *See FDIC v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992); *see Purdue Research Foundation v. Sanofi-Synthelabo*, 338 F.3d 773, 783 (7th Cir. 2003) (“[O]nce a defendant has submitted affidavits or other evidence in opposition to the exercise of jurisdiction, the plaintiff must go beyond the pleadings and submit affirmative evidence supporting the exercise of jurisdiction.”); *see Meier v. Sun International Bahamas, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002) (where “the defendant submits affidavits to the contrary, the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction.”).

The jurisdictional facts in this case are undisputed. While Braver attached an affidavit to his Response, that affidavit does not mention Lead2 and is devoid of facts pertinent to a determination of personal jurisdiction over Lead2. In contrast, Lead2 has submitted the affidavit of Nicholas Passalacqua and has responded to jurisdictional discovery with evidence which supports the conclusion that this Court does not have personal jurisdiction over Lead2. Because Braver has failed to contradict the evidence presented by Lead2, he has not satisfied his burden of showing that there is even a dispute as to the absence of this Court’s jurisdiction over Lead2.

Unable to submit evidence which contradicts the facts presented by Lead2, Braver instead attempts to create “conflicts” in the evidence. These “conflicts” are illusory, and in any event have no bearing on the out-come of the jurisdictional issue before the Court. For example, Braver attempts to dispute that Lead2 purchased the Ron Bartles lead from an unrelated, independent lead supplier which is not an agent of or controlled by Lead2. He does so by stating that there are “unanswered questions” and “sufficient doubt as to Lead2’s role in the generation of the Ron Bartles lead” because Lead2 (i) no longer has records from which to determine (a) from whom specifically the lead was purchased or (b) the number of leads purchased from the source of the Ron Bartles lead, and (ii) no longer possesses a written agreement with the source

of the Ron Bartles lead. (Braver's Response, pp. 3-4, 10). This "argument" not only fails to dispute the Passalacqua Affidavit or the jurisdictional discovery provided by Lead2, but it also contradicts Braver's own Affidavit. It is undisputed that Lead2 was not generating its own leads in January 2004--the critical time period during which Braver alleges the email referenced in paragraph 88 of the Third Amended Complaint ("TAC") was sent. (See TAC, ¶ 88 and Braver Aff., ¶¶ 11-12). Lead2 only generated its own leads for a brief period long after the relevant time of January 2004--specifically, from June 20 to August 8, 2005--and Lead2 has never generated mortgage leads through unsolicited commercial email. (Passalacqua Aff., ¶ 6).

Braver argues that Lead2 is not an "intermediary" or "middleman" between vendors because its activities are more extensive and because Lead2 "has generated its own leads and has sold leads directly to mortgage clients." (Braver's Response, p. 4). While these facts have no bearing whatsoever on the jurisdictional question before the Court, Braver raises them in an apparent effort to suggest to this Court that Lead2 is not trustworthy or that Lead2 has proffered false information through discovery. In reality, Braver is mischaracterizing the evidence. Mr. Passalacqua's straight-forward affidavit states: "Lead2 is a purchaser and seller of information, or 'leads', identifying potential borrowers in connection with mortgages and other loans. Lead2 is an 'intermediary' or 'middleman' between vendors which generate leads and mortgage and other companies." (Passalacqua Aff., ¶ 5).

Braver tries to dispute the fact that Lead2 only generated its own leads from June 20, 2005 to August 18, 2005, by stating that Lead2's website "currently states that the leads it sells are generated from emortgagetree.com in addition to leads received through various sources including: Google, Yahoo and email marketing. (Website, p. 8)." (Emphasis added). Braver ignores the fact that Lead2 specifically informed Braver that the website was last updated in late

2005. (Response to Interrogatory No. 13, Exhibit 3 to Braver's Response). This was during the brief period when Lead2 generated leads through emortgagetree.com. Consistent with this fact, the website itself states at the bottom "Copyright 2002-2005" and, as Braver concedes, Lead2 purchases leads from the other listed sources and does not generate those leads. (Exhibit 4 to Braver's Response). Finally, the evidence is uncontradicted that Lead2 does not now conduct, and never has conducted, email marketing. (Passalacqua Aff., ¶ 7).

Among the facts which Braver's Response fails to challenge are that Lead2 runs different forms of advertisement, none of which is specifically directed to Oklahoma. (Response to Interrogatory No. 13, Exhibit 3 to Braver's Response; Passalacqua Aff. ¶ 10). Although Lead2 placed advertisements with Google for approximately six weeks during 2005 (within the June 20 to August 9, 2005 period), those advertisements were not directed specifically toward Oklahoma. (Passalacqua Aff., ¶ 10). Neither Lead2net.net nor emortgagetree.com have conducted e-mail marketing campaigns and neither has sent commercial e-mails to Oklahoma. (Responses to Request for Admission Nos. 6-7, Exhibit A hereto, and Passalacqua Aff., ¶ 7).

Finally, Braver's Response is misleading as to Lead2's sales of mortgage leads. Lead2 does not have, and has never had, any contracts with or worked with any mortgage brokers or mortgage lead vendors with a principal place of business in Oklahoma. (Compare Braver's Response, pp. 4-5 to Passalacqua Aff., ¶ 12). Since its inception in March, 2003 to the present, only nine of Lead2's approximately 2,100 potential purchasers have visited its website from Oklahoma. (Passalacqua Aff., ¶ 13). And only one of the nine actually purchased leads from Lead2, that being a one time transaction in the approximate amount of \$600. (*Id.*). Moreover,

from September 9, 2005 to July 25, 2006, 428 of 48,671 (or .0088%) leads have been sold by Lead2 for which a person in Oklahoma has provided information. (*Id.*, ¶ 14).¹

II. The Court Lacks General Personal Jurisdiction Over Lead2.

The parties agree that, to determine the nature of a foreign corporation's contacts for general personal jurisdiction, there are four basic factors that should be analyzed. (*See* Braver's Response, p. 6 and *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1533 (10th Cir. 1996)). Application of the *Trierweiler* factors demonstrates that Lead2 does not possess contacts necessary to establish systematic and continuous contacts. Lead2 has one office, which is located in Boca Raton, Florida. (*Passalacqua Aff.*, ¶ 8). Lead2 does not have any Oklahoma offices, agents, or employees and does not recruit employees from Oklahoma. (*Id.*). Lead2 has never sent any employees to Oklahoma for business activities and does not even have any Oklahoma-based stockholders who own an equity interest in Lead2. (*Id.*, ¶¶ 9, 11). Lead2 does not have any Oklahoma bank accounts, facsimile, or telephone listings. (*Id.*, ¶ 8). It does not utilize any form of advertisement whatsoever that is targeted specifically towards Oklahoma in any way, including newspapers, periodicals, and/or the internet. (*Id.*, ¶¶ 7-8, 10, and 13; *see also* Response to Interrogatory No. 13, Exhibit 3 to Braver's Response).² As noted, of the 2,100 potential purchasers who visited Lead2's website, only one of those who actually purchased leads from Lead2 was from Oklahoma, (*id.*, ¶13), that being a one time transaction for approximately \$600. (*Id.*). Lead2 has never had any contracts or worked with any mortgage brokers or mortgage lead vendors with a principal place of business in Oklahoma. (*Id.*, ¶ 12).

¹ Prior to September 5, 2005, Lead2 manually entered lead information into a computer system that no longer exists. Thus, Lead2 does not possess records reflecting this percentage prior to September 5, 2005. (Response to Interrogatory No. 12, Exhibit 3 to Braver's Response).

² Internet advertisements and solicitations are not targeted to a specific geographic location. *Lively v. IJAM, Inc.*, 2005 OK CIV APP 29, ¶ 33, 114 P.3d 487.

Braver does not really attempt to apply the *Trierweiler* factors, but instead cites them and then summarily argues that this Court has general personal jurisdiction over Lead2 because its contacts with Oklahoma are “continuous and systematic.” In support, Braver states that (i) Lead2 solicits business in Oklahoma “through internet marketing which is readily available in Oklahoma,” (ii) “Lead2 has trafficked in mortgage leads targeting Oklahoma that it purchased from others” and (iii) Lead2 “has generated leads relating to Oklahoma residents or property and sold them to third parties.” (Braver’s Response, p. 6). For these propositions Braver cites paragraphs 13 and 14 of the Passalacqua Affidavit. (*Id.*). That affidavit, which is uncontroverted, simply cannot be read to support Braver’s assertions. Instead, Mr. Passalacqua’s testimony proves there is no jurisdiction over Lead2. (*See* Passalacqua Aff., ¶¶ 13-14).

Arguing that Lead2’s website is “interactive,” Braver suggests that this will lead the Court to a finding of general personal jurisdiction. (Braver’s Response, pp. 7-9). As Lead2 stated in its Motion to Dismiss, the key to any analysis of general jurisdiction, as it relates to an interactive or active website, is “the nature and quality of the defendant’s internet activity.” *Lively v. IJAM, Inc.*, 114 P.3d at 496. While Braver makes no response to this component of Lead2’s Motion, its importance to the issues before the Court warrants restatement here. Courts have looked to the use of the website and whether it is actually and deliberately used to conduct commercial transactions “on a sustained basis with a substantial number of residents in the forum.” *Smith v. Basin Park Hotel, Inc.*, 178 F. Supp. 2d 1225, 1235 (N.D. Okla. 2001). In fact, “to rely solely upon Internet presence to establish general jurisdiction requires the defendant to ‘actually and deliberately’ use its website to conduct commercial transactions on a sustained basis with a substantial number of residents of the forum.” *Southern v. All Points Delivery Systems, Inc.*, 2006 U.S. Dist. Lexis 19512, * 8 (March 2, 2006, N.D. Okla.) (quoting *Smith*, 178

F. Supp. 2d at 1235)). Braver then makes the self-serving pronouncement that “the percentage of Lead2’s total mortgage lead business attributable to Oklahoma is about the percentage that would be expected based on Oklahoma’s population,” (Braver’s Response, p. 9)--a monumentally baseless characterization indeed, which in any event, does not change the fact that only *one* person in Oklahoma ever purchased leads from Lead2 based on the use of Lead2’s website.³ It is not a sustainable representation that one sale would be considered a “substantial number of residents.” *See McGill Tech. Ltd. v. Gourmet Techs., Inc.*, 300 F. Supp. 2d 501 (E.D. Mich. 2004) (one sale was not enough to find general personal jurisdiction); *see Hy Cite Corp v. Badbusinessbureau.Com, L.L.C.*, 297 F. Supp. 2d 1154, 1162 (W.D. Wis. 2004) (“[plaintiff] cannot seriously argue that *one* sale is a sufficient ground to hale defendant into a Wisconsin court for any suit.”); *American Education Corp. v. Chase*, 2006 U.S. Dist. Lexis 47788, * 8 (July 13, 2006 W.D. Okla.) (jurisdiction based on one website sale to an Oklahoma resident would ignore the constitutional requirement of deliberate rather than merely foreseeable contacts).

In another attempt to support general jurisdiction, Braver claims (again without any support) that Lead2 has not shown that it has avoided trafficking in mortgage leads in Oklahoma and that there is no evidence that Lead2 excluded Oklahoma from internet advertising. (Braver’s Response, p. 8). Needless to say, these are not the test for jurisdiction. It is the defendant’s actual operations, not the defendant’s potential operations, in Oklahoma which are relevant. *See e.g. Southern*, 2006 U.S. Dist. Lexis 19512 at * 12-13. (“Unlimited **potential** for pervasive and substantive commercial activity in the State of Oklahoma does not grant general jurisdiction

³ Without any citation to evidence Braver states that the “[s]ale of mortgage leads directly to brokers within Oklahoma is only a small part of Lead2’s business.” (Braver’s Response, p. 9). Again, Lead 2 has sold only one time to a person in Oklahoma, and it has never had any contacts with any brokers or mortgage companies with a principal place of business in Oklahoma. (Passalacqua Aff., ¶¶ 12-13). There is no other “part of Lead2’s business” within Oklahoma--none.

where **actual** operations are not provably so.”) (emphasis in original).⁴ Braver has neither discovered nor advanced any evidence that Lead2’s website is accessed on a sustained basis by a substantial number of Oklahoma residents. There is no such evidence.

III. The Court Also Lacks Specific Personal Jurisdiction Over Lead2.

Nowhere in Braver’s Response does he fully or correctly articulate the factors which must be met for specific personal jurisdiction. The inquiry is two-fold, and each prong must be met. (See Lead2’s Motion to Dismiss, p. 10). Instead, Braver’s Response suggests that this Court has specific personal jurisdiction over Lead2 because (i) Lead2 has no records of the specific supplier of the Ron Bartles lead, and thus there are “unanswered questions” and “sufficient doubt as to Lead2’s role in the generation of the Ron Bartles lead,” (ii) Lead2 allegedly made no effort to “limit its trafficking to leads not originating from spam sent to Oklahoma,” and (iii) “middlemen like Lead2 make the spam industry possible.” (Braver’s Response, pp. 10-11). None of these “arguments” overcome the jurisdictional defects peculiar to plaintiff’s claims against Lead2.

First, Braver accuses Lead2 of submitting false information to the Court regarding the source of the Ron Bartles lead by again claiming that Lead2 may have generated the lead itself. (*Id.*, p. 10). Braver’s allegations are not substantiated by the record before this Court. (See *supra* at 2-3). Second, Braver’s Response, as with his TAC, does not allege how Lead2 purposefully directed any activity to Oklahoma by purchasing and selling a lead of an individual that, by Lead2’s belief, resided in St. Louis, Missouri.⁵ Braver’s Affidavit does not even mention Lead2. (See Exhibit 1 to Braver’s Response). Instead, Braver ignores any standard

⁴ Further, Braver’s reliance upon *Ty, Inc. v. Baby Me, Inc.*, 2001 U.S. Dist. Lexis 5761, * 23 (April 25, 2001 N.D. Ill.) is misleading. (Braver’s Response, pp. 8-9). That case dealt with specific jurisdiction.

⁵ Lead2’s belief that Ron Bartles resided in Missouri was the result of a false decoy lead containing information provided by Braver himself. (See Braver Aff., ¶¶ 11-12).

applicable to the determination of specific personal jurisdiction and argues that Lead2 subjected itself to specific jurisdiction by failing to limit its trafficking to leads not sent from Oklahoma. (Braver's Response, p. 10). In support of this contention, Braver cites *Gary Scott Intern., Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997). Contrary to any fact analogous to this case, *Gary Scott* involved a defendant that (i) chose to market its product in Massachusetts, (ii) "entered into a contract to sell twelve 'Tobacco Keepers' to a Massachusetts retailer," and (iii) stated that he planned to sell a large quantity of his product to a business in Massachusetts. *Gary Scott*, 981 F. Supp. at 716. The plaintiff's claims in *Gary Scott* were also directly connected to the defendant's contacts with the forum state. *Id.* Lead2's purchase of one lead and subsequent sale of that lead, which was thought at the time to have originated from Missouri, in no way represents any form of contact with Oklahoma remotely analogous to the direct contact which existed in *Gary Scott*. To suggest that Lead2 should have been on the same notice of being haled into court as was the case in *Gary Scott* is disingenuous.⁶

Braver's attempt to distinguish Lead2's reliance upon *Reliance Nat'l Indem. Co. v. Pinnacle Cas. Assur. Corp.*, 160 F. Supp. 2d 1327 (M.D. Ala. 2001), where the Court granted dismissal for lack of personal jurisdiction based upon the fact that the defendant did not direct any emails to the plaintiff and did not have any contact with the plaintiff or his server, is premised upon completely fabricated allegations regarding the facts of this case. In particular, Braver states that "[i]n the instant case . . . the spam email was sent to the Plaintiff ***as a purposeful part of the business of generating mortgage leads.***" (Braver's Response, p. 11, emphasis added). Braver also baldly alleges that "[t]he spam email was not sent by a third party

⁶ Braver also cites *Internet Doorways, Inc. v. Parks*, 138 F. Supp. 2d 773, 779 (S.D. Miss. 2001) to suggest that the sending of email solicitations would put Lead2 at risk for being haled into Court in Oklahoma. (Braver's Response, p. 11). The obvious problems with this are that Lead2 does not send email solicitations, did not send the email at issue to Braver's server, and has never sent any commercial emails to Oklahoma. (Passalacqua Aff., ¶¶ 4, 7, 16).

with no connection to Lead2.” (*Id.*, p. 12). Again, Braver’s baseless, unsubstantiated statements misrepresent facts revealed through discovery as well as the affirmative statements of Nicholas Passalacqua, and in no way lead to a conclusion that this Court should decide this case any differently than did the *Reliance* court. (*See* Passalacqua Aff., ¶¶ 6, 7, 16-17).

No legal argument advanced or “facts” alleged by Braver’s Response alter the conclusions that Braver cannot show (i) that Lead2 purposefully directed its activities towards Oklahoma, (ii) that his claim arises out of or results from actions by Lead2 which themselves create a substantial connection with Oklahoma, or (iii) that exercise of personal jurisdiction over Lead2 would not offend the “traditional notions of fair play and substantial justice.” *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998). In this case, Lead2 merely purchased a Missouri lead and sold that lead to Ameriquest.

IV. Braver Cannot And Has Not Alleged Conspiracy Jurisdiction.

Lead2 adopts the arguments in Section III.B of the Reply to Plaintiff’s Response to Motion and Memorandum to Dismiss of Tim Foust and Tandax, Inc. filed herein on June 19, 2006, (Doc. No. 357) (“Tandax Reply”).

V. Braver Does Not Have Standing To Pursue Can-Spam Claims.

Lead2 joins in Section III.D of the Tandax Reply.

VI. Braver’s Third Amended Complaint Does Not State A Claim.

Lead2 joins in Section III.C of the Tandax Reply.

Conclusion

For all the foregoing reasons and those discussed in its initial brief, Lead2 is entitled to an order granting its Motion to Dismiss against Braver on all claims asserted against it in the Third Amended Complaint.

Respectfully submitted,

s/John E. Dowdell

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2006, I electronically transmitted the attached document to the Clerk of Court using ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I hereby certify that on August 24, 2006, I served the attached document by U.S. Mail, postage pre-paid, on the following, who are not registered participants of the ECF System:

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